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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-437

MYRON M. AMATO and
JACK L. ROCKEY,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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The statement of the case contained in the brief of the petitioners is substantially accurate.

REASONS FOR DENYING A WRIT OF CERTIORARI

I. A Decision By State Courts That Matter Which Deals With Sexual Conduct Rather Than Mere Nudity And Otherwise Satisfies The *Roth-Memoirs* Test Is Obscene Does Not Raise A Federal Question So Substantial As To Require Review By The Supreme Court.

The Wisconsin supreme court distinguished the magazines involved in this case from those involved in *Central Magazine Sales Ltd. v. United States,* 389 U.S. 50, 88 S.Ct. 1414, 18 L.Ed. 2d 515 (1967).

While conceding some similarity in that certain phtographs in both instances picture only seated nude models, the Wisconsin court declared:

> "We think the magazines here involved are more than a collection of photographs of nude men and women which suggest sexual activity. In the instant case much of the material concerns itself with the depiction of sexual activity." *State v. Amato* (1971), 49 Wis. 2d 633, 642 183 N.W. 2d 29, A-P., 21.

The petitioners, in their brief, concede at least that two of the magazines, *Tulip Review* and *Heads Up,* "involve photographs of nude males and females together in sexually suggestive poses." Br.-P., 10.

Although this Court has indicated, by its *Redrup* reversals and its denial of certiorari in *Keriakos v. Hunt,* 400 U.S. 929, that depiction of mere nudity is in most cases not obscene, it has declined to extend summary treatment to cases where the matter involved deals with depiction of sexual conduct and should decline to do so here.

II. A Decision By State Courts That Contemporary Community Standards Need Not Be Proved By Expert Testimony Does Not Raise Federal Questions So Substantial As To Require Review By The Supreme Court.

This Court has never held that the contemporary community standards of which the *Roth-Memoirs* test speaks must be proved in each prosecution by the testimony of expert witnesses.

The question has been presented to the Court in at least two cases and in both certiorari has been denied.

In *Kahm v. United States,* 300 F. 2d 78 (5th Cir., 1962), the circuit court of appeals reasoned:

> ". . . It is argued that without . . . proof as to what were the contemporary community standards there was no case for the jury. . .
>
> "It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the Roth case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present." 300 F. 2d at p. 84; Cert. den. 369 U.S. 859, 82 S.Ct. 949, 8 L.Ed. 2d 18 (1962).

The Missouri supreme court held that expert testimony of contemporary community standards goes to a question of ultimate fact and would therefore invade the province of the jury. *State v. Smith,* 422 S.W. 2d 50 (Mo. 1967), cert. den. *Smith v. Missouri,* 393 U.S. 895, 89 S.Ct. 150, — L.Ed. 2d — (1968).

The decision of the Wisconsin supreme court does not present any more compelling cause for review than did *Kahm* and *Smith* and review should therefore be similarly denied.

III. The Jury Instructions Given By The Trial Court Do Not Raise Federal Questions So Substantial As To Require Review By The Supreme Court.

The instructions given to the jury which convicted Amato and Rockey were not challenged on direct appeal to the Wisconsin supreme court. The court refused to scrutinize them when they were challenged for the first time on motion for rehearing, the Wisconsin rule being that new issues may not be raised at that juncture. *Bump v. Dahl* (1965), 26 Wis. 2d 607, 134 N.W. 2d 665.

Since the ultimate questions were not passed upon by the state court, they should not be considered by this Court on a writ of certiorari. See *United States v. Fleischman,* 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906, rehearing denied 339 U.S. 991, 70 S. Ct. 1017, 94 L. Ed. 1391 (1950); *Owens v. Union Pacific R. Co.,* 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683, opinion conformed to 142 F. 2d 145, cert. den. 323 U.S. 740, 65 S. Ct. 57, 89 L. Ed. 593 (1943).

Besides, it has generally been held that a challenge to jury instructions does not in any event raise a substantial constitutional question.

See, e.g., *Margoles v. United States* (7th Cir., 1969), 407 F. 2d 727, 735, cert. den. 396 U.S. 833, 90 S.Ct. 89, 24 L.Ed. 2d 84; *Feeney v. United States* (1st Cir., 1968), 392 F. 2d 541; *Hilliard v. United States* (10th Cir. 1965), 345 F. 2d 252; *United States v. Stevens* (3rd Cir., 1958), 260 F. 2d 549; *Banks v. United States* (9th Cir., 1958), 258 F. 2d 318, cert. den. 358 U.S. 886, 79 S.Ct. 128, 3 L.Ed. 2d 114; *Adams v. United States* (D.C. Cir., 1955), 222 F. 2d 45.

CONCLUSION

It is therefore respectfully submitted that a writ of certiorari should be denied.

In the event it might appear that the decision of the Wisconsin supreme court dealt with issues this Court considers ripe for review, the respondent respectfully prays that it be given an opportunity to more fully expound its position in further briefs and oral argument on the merits.

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